Supreme Court, U.S.
FILED

(1)

No. 941483 MAR - 8 1995

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF INDEPENDENCE, MISSOURI;
LARRY KAUFMAN, Acting City Manager,
City of Independence, Missouri;
WILLIAM CARPENTER, Mayor,
City of Independence, Missouri,

*Petitioners,*

v.

ROBERT E. RINEHART,

*Respondent.*

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

THOMAS C. WALSH
*(Counsel of Record)*
RONALD L. HOLT
LINDA B. FORSYTHE
1200 Main Street, Suite 3300
P.O. Box 419914
Kansas City, Missouri 64141-6914
(816) 374-3200

*Attorneys for Petitioners*

BRYAN CAVE
Of Counsel

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

44 pp

## QUESTION PRESENTED

Should a plaintiff in an age discrimination case be required, as part of his prima facie showing, either to establish that he was replaced by someone outside the protected class or to adduce other evidence of age discrimination — the requirement in at least four circuits — or should he be able to avoid judgment as a matter of law merely by showing that he was replaced by someone younger, as held by the Eighth Circuit in this case?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS AND ORDERS BELOW | 1 |
| JURISDICTIONAL STATEMENT | 2 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 4 |
| CONCLUSION | 10 |
| APPENDIX A: Opinion of the United States Court of Appeals for the Eighth Circuit | A-1 |
| APPENDIX B: Order Denying Rehearing and Rehearing En Banc | A-14 |
| APPENDIX C: Opinion of the United States District Court for the Western District of Missouri | A-15 |
| APPENDIX D: Supplemental Order | A-26 |

## TABLE OF AUTHORITIES

Page(s)

### Cases

Armbruster v. Unisys Corp., 32 F.3d 768 (3d Cir. 1994) ..... 6

Banks v. City of Independence, 21 F.3d 809 (8th Cir. 1994) ..... 9

Breitman v. May Co. California, 37 F.3d 562 (9th Cir. 1994) ..... 8

Celotex Corp. v. Catrett, 477 U.S. 317 (1976) ..... 4

Gagne v. Northwestern National Ins. Co., 881 F.2d 309 (6th Cir. 1989) ..... 7

Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985) .... 5

Hall v. Western Prod. Co., 988 F.2d 1050 (10th Cir. 1993) ..... 8

Hayman v. National Academy of Sciences, 23 F.3d 535 (D.C. Cir. 1994) ..... 8

Ingels v. Thiokol Corp., 42 F.3d 616 (10th Cir. 1994) ..... 8

Kauffman v. Kent State University, 1994 U.S. App. LEXIS 6557 (6th Cir. Apr. 1, 1994) ..... 7

Kehoe v. Anheuser-Busch, Inc., 995 F.2d 117 (8th Cir. 1993) ..... 3,7

Kralman v. Illinois Dep't of Veterans' Affairs, 23 F.3d 150 (7th Cir.), *cert. denied,* 130 L.Ed.2d 313 (1994) ..... 7

Leichihman v. Pickwick Int'l, 814 F.2d 1263 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987) ..... 4

Manzer v. Diamond Shamrock Chemicals, 29 F.3d 1078 (6th Cir. 1994) ..... 7

Marr v. Dixon, 1994 U.S. App. LEXIS 26597 p.12 (6th Cir. Sept. 19, 1994) ..... 7

Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) ..... 6

Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993) ..... 6

Moore v. Eli Lilly & Co., 990 F.2d 812 (5th Cir.), *cert. denied*, 114 S.Ct. 467 (1993) ..... 7

Rinehart v. City of Independence, Mo., 35 F.3d 1263 (8th Cir. 1994) ..... 7,9

Robinson v. Overseas Military Sales Corp., 21 F.3d 502 (2d Cir. 1994) ..... 6

Sahadi v. Reynolds Chemical, 636 F.2d 1116 (6th Cir. 1980) ..... 5

Sanchez v. Puerto Rico Oil Co., 37 F.3d 712 (1st Cir. 1994) ..... 6

Siegel v. Alpha Wire Corp., 894 F.2d 50 (3d Cir.), *cert. denied*, 496 U.S. 906 (1990) ..... 6

Sturniolo v. Sheaffer, Eaton, Inc., 15 F.3d 1023 (11th Cir. 1994) ..... 8

Turner v. North American Rubber, Inc., 979 F.2d 55 (5th Cir. 1992) ..... 5

Waggoner v. City of Garland, 987 F.2d 1160 (5th Cir. 1993) ..... 7

## Statutes

28 U.S.C. §1254(1) ..... 2

28 U.S.C. §§1331, 1332, 1343(3) and (4) ..... 3

29 U.S.C. § 621(b) ..... 8

29 U.S.C. §623 ..... 2

29 U.S.C. §626(c) ..... 3

42 U.S.C. §1983 ..... 3

## Other Authorities

1993 Annual Report of the Director of the Administrative Office of the United States Courts ..... 8

Fayssoux, The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change, 73 Va.L.Rev. 601 (1987) ..... 5

# No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

---

CITY OF INDEPENDENCE, MISSOURI;
LARRY KAUFMAN, Acting City Manager,
City of Independence, Missouri;
WILLIAM CARPENTER, Mayor,
City of Independence, Missouri,

*Petitioners,*

v.

ROBERT E. RINEHART,

*Respondent.*

---

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

Petitioners, City of Independence, Missouri; Larry Kaufman, Acting City Manager, City of Independence, Missouri; and William Carpenter, Mayor, City of Independence, Missouri, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit entered in the above-entitled proceedings.

### OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 35 F.3d 1263 and reproduced in

Appendix A at A-1. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in Appendix B at A-14. The unreported memorandum opinion and order of the United States District Court for the Western District of Missouri granting petitioner's Motion for Summary Judgment appears in Appendix C at A-15. The Supplemental Order of the district court is set forth in Appendix D at A-26.

## JURISDICTIONAL STATEMENT

The Eighth Circuit's judgment in this Age Discrimination in Employment Act ("ADEA") case was entered on September 23, 1994. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order dated December 12, 1994. This Petition is being filed within 90 days of December 12. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTE INVOLVED

Title 29 U.S.C. §623, *et seq.*, entitled "Prohibition of Age Discrimination":

> "It shall be unlawful for an employer —
>
> > "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."

## STATEMENT OF THE CASE

Respondent Rinehart, an at-will employee of the City of Independence, was age 67 at the time of his termination by Petitioner Kaufman, the Acting City Manager who had complete hiring and firing authority (Apdx. A-2). Respondent had served as the Chief of Police of the City of Independence for twelve years. *Id.* Following respondent's termination, Major Shannon Craven, who was 48 years of age and one of Rinehart's three

immediate subordinates, was appointed Acting Chief of Police. *Id.* at A-3. Respondent brought suit in the United States District Court, Western District of Missouri, and jurisdiction was exercised pursuant to 28 U.S.C. §§1331, 1332, 1343(3) and (4), 42 U.S.C. §1983 and 29 U.S.C. §626(c).

After full discovery, petitioners moved for summary judgment on respondent's age discrimination claims on the basis that he had failed to show that age played a factor in his termination, a showing which petitioners contend is part of the prima facie case requirements for an ADEA termination claim when a plaintiff's replacement is within the protected age class. The district court, citing *Kehoe v. Anheuser-Busch, Inc.*, 995 F.2d 117 (8th Cir. 1993), held that because respondent's replacement was over age 40, respondent was required to come forward with some other evidence by which a factfinder could find that the termination was age-related. As respondent had failed to make such a showing, the district court granted summary judgment for petitioners (Apdx. A-15).

The Court of Appeals reversed and ruled "that the district court erred to the extent it required Rinehart to demonstrate as part of his prima facie case that his replacement came from outside the protected class of workers aged 40 or above" (Apdx. A-6). The court further held that "the district court erred by requiring Rinehart to make an additional showing that age was a factor in his termination as part of his prima facie case." *Id.* at A-8. Rehearing and rehearing en banc were denied, one judge dissenting. *Id.* at A-14.

## REASONS FOR GRANTING THE WRIT

### THERE IS A WIDE DIVERGENCE AMONG THE CIRCUITS ON THE IMPORTANT ISSUE PRESENTED BY THIS PETITION, AND THE RULE ADOPTED BY THE EIGHTH CIRCUIT CREATES AN ILLOGICAL PRESUMPTION IN FAVOR OF ADEA PLAINTIFFS.

The purpose of requiring a plaintiff to make a prima facie showing in order to avoid summary judgment is, of course, to weed out at the pre-trial stage those claims which are legally insubstantial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1976). All circuits are in basic agreement that a terminated ADEA plaintiff must show in his prima facie case that he was: (1) a member of the protected class, (2) qualified for the position, and (3) discharged or laid off. But the circuits are in complete disarray as to the fourth and final element of the plaintiff's required showing. Since the ADEA is designed to protect persons over age 40 from discrimination based on their age, many courts have required a terminated ADEA plaintiff either to demonstrate that he was replaced by someone outside the protected class or to come forward with other direct or circumstantial evidence that would support an inference of discrimination. The requirement of such a showing provides an adequate and reasonable basis for an inference of age discrimination, rather than merely permitting juries to assume (as they frequently are wont to do) that there is some causal connection between the plaintiff's age and the treatment accorded him.[1]

Without a requirement that a plaintiff either prove he was replaced by someone outside the protected class or adduce some

---

[1] "A prima facie case . . . at least requires the plaintiff to show that the employer's actions were more likely than not based on a consideration of impermissible factors." *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1270 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987).

proof of age discrimination, there will be an "automatic presumption" of discrimination in nearly every ADEA case, since older employees who retire or are terminated frequently are replaced by someone younger. *See Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 (6th Cir. 1980). "'Because younger people often succeed to the jobs of older people for perfectly legitimate reasons, the mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement was motivated by age discrimination.'" *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992), quoting *LaMontagne v. American Convenience Prod., Inc.*, 750 F.2d 1405, 1413 (7th Cir. 1984); *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1443 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985).

The Court of Appeals' ruling in this case permits such an inference and essentially enables a terminated plaintiff to get to the jury without adducing any proof whatever of discriminatory animus or conduct, leaving the jury free to punish the deep-pocket employer even though no evidence of discrimination has been presented.[2]

The Court of Appeals in this case acknowledged that "there is a split of authority on [the fourth element] in the other circuits . . . " and concluded that the position taken in its opinion ". . .

---

[2] The confusion surrounding the prima facie case requirements has led to an increased number of appellate court reversals of verdicts that lacked adequate evidentiary support:

> "While it is true that jury verdicts are often correctly reversed by the appellate courts, a review of ADEA cases illustrates that the courts are overturning jury verdicts at an alarming rate . . . . This trend of juries returning verdicts for plaintiffs and defendants prevailing on appeal suggests that something is wrong in the courts' handling of ADEA cases."

Fayssoux, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA.L.REV. 601, 615 n.90 (1987).

appears to be consistent with the majority view" (Apdx. A-6 n.2). But the court's analysis was flawed, for if there is a "predominant" view, it is the approach adopted by the district court below and in the most recent pronouncements of the Fourth, Fifth, Eleventh and District of Columbia Circuits.

The following summary illustrates the divergence of the currently prevailing views held by the circuits:

- *First Circuit* — plaintiff must show only that the employer sought a replacement with roughly equal qualifications.[3]

- *Second Circuit* — plaintiff must show generally that he was replaced under circumstances giving rise to an inference of discrimination.[4]

- *Third Circuit* — plaintiff must show that he was replaced by one "sufficiently younger" to permit an inference of discrimination.[5]

- *Fourth Circuit* — plaintiff must either show that he was replaced by one from outside the protected class or adduce evidence that age was not treated neutrally.[6]

---

[3] *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 (1st Cir. 1994).

[4] *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 508 (2d Cir. 1994).

[5] *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994); *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 53 (3d Cir.), *cert. denied*, 496 U.S. 906 (1990); *but see Maxfield v. Sinclair International*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) ("proof of replacement by a younger person is not conclusive of discrimination but is merely one element in a set of circumstances that may give rise to an inference of discrimination").

[6] *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993).

• *Fifth Circuit* — plaintiff must either show that he was replaced by one from outside the protected class or adduce some other evidence of age discrimination.[7]

• *Sixth Circuit* — there is an intra-circuit conflict as to the required showing.[8]

• *Seventh Circuit* — there is an intra-circuit conflict as to the required showing.[9]

• *Eighth Circuit* — according to the Court of Appeals in this case, plaintiff need only show that he was replaced by someone younger.[10]

---

[7] *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir.), *cert. denied*, 114 S.Ct. 467 (1993); *Waggoner v. City of Garland*, 987 F.2d 1160, 1163-64 (5th Cir. 1993).

[8] *Compare Marr v. Dixon*, 1994 U.S. App. LEXIS 26597 p.12 (6th Cir. Sept. 19, 1994) (replacement must be from outside the class) *and Kauffman v. Kent State University*, 1994 U.S. App. LEXIS 6557 (6th Cir. Apr. 1, 1994) (failure to promote — replacement must be from outside the class) *with Manzer v. Diamond Shamrock Chemicals*, 29 F.3d 1078, 1081 (6th Cir. 1994) (the standard to be met is that replacement come from outside the class but the court further stated that "a prima facie case has been shown where the plaintiff was replaced by someone younger, even though that person may still be within the protected class") *and Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 312 (6th Cir. 1989) (court held standard is replacement outside the protected class but then stated "[i]n the case at bar . . . [it was sufficient] that she was replaced by a younger person").

[9] *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 153 n.2 (7th Cir.), *cert. denied*, 130 L.Ed.2d 313 (1994) (". . . there are no fewer than four different statements of the prima facie requirements in cases involving discharges").

[10] *Rinehart v. City of Independence, Mo.*, 35 F.3d 1263, 1265 (8th Cir. 1994); *but see Kehoe v. Anheuser-Busch, Inc.*, 995 F.2d 117, 119 (8th Cir. 1993) ("plaintiff must also either show that the employer assigned a non-member of the protected class to do the same work . . . or make 'some additional showing' that age played a role in the discharge").

• *Ninth Circuit* — plaintiff must show that he was replaced by one "substantially younger."[11]

• *Tenth Circuit* — plaintiff must show that his replacement is younger.[12]

• *Eleventh Circuit* — plaintiff must show his replacement came from outside the protected class.[13]

• *District of Columbia Circuit* — plaintiff must show his replacement came from outside the protected class.[14]

This hodge-podge of contradictory rulings on such a heavily litigated issue of federal law cries out for clarification by this Court.[15] The test for submissibility endorsed below by the Eighth Circuit unfairly tips the scales in favor of the employee and permits jury consideration of discrimination claims that are based on nothing more than speculation and sympathy. It is also inconsistent with the goal of the ADEA "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). To achieve this goal in today's national and international workplace, there must be a uniform standard to guide employers in making termination decisions and to assist workers in deciding if their rights have

---

[11] *Breitman v. May Co. California*, 37 F.3d 562, 565 (9th Cir. 1994).

[12] *Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994); *but see Hall v. Western Prod. Co.*, 988 F.2d 1050 (10th Cir. 1993) (replacement must be from outside the class).

[13] *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994).

[14] *Hayman v. National Academy of Sciences*, 23 F.3d 535, 537 (D.C. Cir. 1994).

[15] According to the 1993 Annual Report of the Director of the Administrative Office of the United States Courts, there were 12,962 new "employment cases" filed during fiscal 1993. *See* Table C-2A. Even if only one-third of those involved ADEA discharge or layoff claims, the burden on the judicial system is apparent, and the necessity of weeding out meritless claims at the pre-trial stage is self-evident.

been violated. The current state of the law promotes confusion, endless litigation and, potentially, forum shopping.

The appropriateness of summary judgment on a given set of facts should not depend upon geographical happenstance or, for that matter, upon panel composition within a given circuit.[16] This Court should review this case and provide a uniform standard to govern the thousands of ADEA cases filed each year in the federal courts.

---

[16] The irony of inconsistent outcomes reached by different panels of the same court is aptly demonstrated by comparing this case to *Banks v. City of Independence*, 21 F.3d 809 (8th Cir. 1994). Each plaintiff was, at the time of his termination, the oldest department director employed by the City of Independence. Both termination decisions were made by defendant Kaufman. Both plaintiffs were replaced by younger, subordinate employees. Banks and Rinehart filed identical complaints, and in both cases the district court granted summary judgment for the defendants. The judgment in *Banks* was affirmed because the panel required him, under the fourth element, to make an "additional showing" of age discrimination. The panel in *Rinehart* viewed almost identical facts but reached the opposition conclusion by applying a different test.

## CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Thomas C. Walsh
*(Counsel of Record)*
Ronald L. Holt
Linda B. Forsythe
1200 Main Street, Suite 3300
P.O. Box 419914
Kansas City, MO 64141-6914
(816) 374-3200

*Attorneys for Petitioners*

BRYAN CAVE
Of Counsel

March 1995

# APPENDIX

BEST AVAILABLE COPY

## APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-3560

Robert E. Rinehart,
Plaintiff-Appellant,

v.

City of Independence, Missouri; Larry Kaufman, Acting City Manager, City of Independence, Missouri; William Carpenter, as Mayor, City of Independence, Missouri,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: April 12, 1994
Filed: September 23, 1994

Before FAGG, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

HANSEN, Circuit Judge.

Robert E. Rinehart appeals from the district court's order granting summary judgment on his age discrimination claims under the Age Discrimination in Employment Act and the Missouri Human Rights Act, and on his claim for retirement benefits under the Missouri Local Government Employees' Retirement System. Rinehart argues that in deciding his age discrimination claims, the district court erred by requiring him in this non-reduction-in-force case to show as part of his prima facie case either that he was replaced by someone outside the protected age class or that age was a determining factor in the termination decision. Rinehart also argues that the district court

erred in granting summary judgment to the defendants on his claim for retirement benefits. We reverse in part, affirm in part, and remand.

## I.

Robert Rinehart served as Chief of Police of Independence, Missouri, for 12 years before he was fired on April 7, 1992, at age 67. On August 11, 1992, he filed this action in the United States District Court for the Western District of Missouri against the City of Independence, Missouri; William Carpenter, the Mayor of Independence, Missouri; and Larry Kaufman, the Acting City Manager of Independence, Missouri (collectively "the defendants"), asserting four claims. In count I, Rinehart asserted unlawful age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. In count II, he asserted the denial of due process and the violation of his First Amendment rights under 42 U.S.C. § 1983. In count III, he asserted unlawful age discrimination under the Missouri Human Rights Act (MHRA), Mo. Ann. Stat. §§ 213.010-213.137 (Vernon 1987). In count IV, he asserted that the City violated his right to benefits under the Local Government Employees Retirement System (LAGERS), Mo. Ann. Stat. §§ 70.600-70-70-750 (Vernon 1987).

The defendants filed a motion for summary judgment on all four of Rinehart's claims. Rinehart filed a resistance and submitted a variety of factual materials in support of his resistance. On September 28, 1993, the district court granted the defendants' motions for summary judgment on all claims.

In addressing the age discrimination claims in counts I and III, the district court applied the now familiar burden-shifting analysis the Supreme Court laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which requires a plaintiff to first establish a prima facie case of unlawful employment discrimination. The district court found that to establish a prima facie case,

Rinehart was required to show: "(1) he was within the protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was discharged; (4) his employer attempted to replace him." *Rinehart v. City of Independence, et al.*, No. 92-0728-CV-W-8, slip op. at 3 (W.D. Mo. Sept. 28, 1993) (quoting *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448 (8th Cir. 1993)) (other citations omitted). The district court also found that the fourth element of the prima facie case test required Rinehart to show either that he was replaced by someone outside the protected class or that age played a role in the decision to discharge him. *Id.* (citing *Kehoe v. Anheuser-Busch, Inc.*, 995 F.2d 117, 119 (8th Cir. 1993)).

The defendants admitted, for the purposes of the summary judgment motion on counts I and III, that Rinehart could satisfy the first three elements of a prima facie case. The only issue was whether Rinehart had made a sufficient showing to satisfy the fourth element of the prima facie case. The district court concluded that Rinehart failed to make the necessary showing on the fourth element. The district court first found that Rinehart was not replaced by someone outside the protected class, which consists of workers age 40 and older, because he was replaced by Shannon Craven, who was 48 years old. The district court then found that Rinehart could only establish a prima facie case by providing evidence that age was a factor in the decision to fire him. The district court concluded Rinehart had failed to produce any such evidence and granted summary judgment for the defendants on counts I and III.

The district court also granted summary judgment on counts II and IV. In count II, Rinehart alleged both a violation of his due process rights because he did not receive a post-termination hearing and a violation of his First Amendment rights. The district court found that the record indicated only that Rinehart's own actions were responsible for the failure to receive the post-termination hearing and that there were simply no grounds for a

First Amendment claim. In count IV, Rinehart made a claim that his termination denied him the right to collect benefits to which he otherwise would have become entitled under LAGERS. After he was terminated, the City of Independence voted to reimburse current employees for certain LAGERS contributions they had made to the fund. Rinehart asserts a claim for the funds he would have received as reimbursement had he not been fired. The district court found that because he was not employed by the city at the time, he had no legal basis to support a claim for the reimbursement. Accordingly, the district court entered summary judgment against Rinehart on counts II and IV as well.

Rinehart appeals the district court's order to the extent it granted summary judgment on his age discrimination claims, counts I and III, and on his claim for LAGERS benefits, count IV. He does not appeal with respect to count II. The Equal Employment Opportunity Commission (EEOC) has filed an amicus brief on behalf of Rinehart which addresses the age discrimination claims.

## II.

A district court should grant summary judgment only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's decision granting summary judgment de novo.

### A.

Rinehart first argues that the district court erred in granting summary judgment on his age discrimination claims under the ADEA and the MHRA.[1] The only issue in dispute on these age

---

[1] The parties agree that the same analysis applies for age discrimination claims under both the ADEA and the MHRA. *See Roberts v. Panhandle E. Pipeline Co.*, 763 F. Supp. 1043, 1050 (W. D. Mo. 1991); *Midstate Oil Co. v. Missouri Comm'n on Human Rts.*, 679 S.W.2d 842, 845-46 (Mo. 1984) (en banc).

discrimination claims is whether the district court correctly stated and applied the fourth element of a prima facie case of age discrimination. The district court required Rinehart to show as the fourth element of his prima facie case either (1) that he was replaced by someone outside the protected class of workers aged 40 or older or (2) that age was a factor in the termination decision. Rinehart argues that a prima facie case of age discrimination in a non-reduction-in-force case does not require a showing of either one of those factors but requires a showing only that he was replaced by someone younger. Given the facts of this case, we agree.

We have specifically noted that "[a] plaintiff need not be replaced by a person outside the protected age group to make out a prima facie case under the ADEA; the plaintiff need only be replaced by a younger person." *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 366 n.6 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). Moreover, we have consistently held in Title VII cases that proof that the plaintiff was replaced by a person outside the protected class is not required. *Davenport v. Riverview Gardens Sch. Dist.*, No. 93-2032, slip op. at 6-7 (8th Cir. July 7, 1994); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994); *Walker v. St. Anthony's Med. Ctr.*, 881 F.2d 554, 558 (8th Cir. 1989). In both *Davenport* and *Williams*, we specifically found that the district court erroneously required the plaintiff to show he was replaced by someone outside the protected class in order to establish the fourth element of his prima facie case. *Davenport*, slip op. at 6; *Williams*, 14 F.3d at 1308. While this evidence is probative of the ultimate issue of intent to discriminate, it is not a per se requirement, and thus it is not required to show a prima facie case. *Davenport*, slip op. at 6; *Williams*, 14 F.3d at 1308. Because the prima facie case standards in Title VII cases and those in ADEA cases are substantially similar, *see, e.g., Radabaugh*, 997 F.2d at 448; *Richmond v. Board of Regents of Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992) (applying the same prima facie case for analyzing Title VII, ADEA, and other

employment discrimination claims); *see also Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting Title VII and ADEA similar in both their aims and substantive provisions), we conclude that the rationale of the Title VII cases should extend to the present case as well. We conclude that the district court erred to the extent it required Rinehart to demonstrate as part of his prima facie case that his replacement came from outside the protected class of workers aged 40 or above.[2]

---

[2] While there is a split of authority on this issue in the other circuits, our position appears to be consistent with the majority view. *Compare Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994) (prima facie case of age discrimination does not require showing that replacement came from outside protected class — "[i]ndeed, it is considered 'hornbook law' that the ADEA action can be based on discrimination between older and younger members of the protected class"); *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1374 (2d Cir. 1989) (noting in dicta that plaintiff in ADEA suit not precluded from prevailing when replacement is younger but within protected class), *cert. denied*, 494 U.S. 1026 (1990); *Freeman v. Package Mach. Corp.*, 865 F.2d 1331, 1335 n.2 (1st Cir. 1988) (replacement by younger person or one outside protected class "not an element of the plaintiff's prima facie case in an ADEA suit"); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985) (to make a prima facie case "replacement need not be younger than 40, the age at which ADEA protection begins"), *cert denied*, 474 U.S. 1057 (1986); *Douglas v. Anderson*, 656 F.2d 528, 532-33 (9th Cir. 1981) (replacement need not be within protected class to establish a prima facie case on ADEA claim); *with Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (fourth element of prima facie case is that replacement comes from outside protected class; *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (same); *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993) (third element of prima facie case is that replacement from outside protected class); *see also Fields v. J.C. Penney Co.*, 968 F.2d 533, 536 & n.2 (5th Cir. 1992) (fourth element of prima facie case is *either* replacement is from outside protected class or replacement is younger or discharge was based on age). We note, however, that there is also contrary authority in the Fourth and Sixth Circuits, *see Lovelace v. Sherwin-Williams, Co.*, 681 F.2d 230, 237-38 n.5 (4th Cir. 1982) (ADEA claim does not require proof that replacement came from outside class); *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.)

*(Footnote 2 continued on next page)*

Similarly, we have never required plaintiffs bringing age discrimination claims to make as part of the fourth element of a prima facie case an "additional showing" that age was a factor in the termination decision other than in reduction-in-force cases. *See, e.g., Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985). In *Bashara*, we specifically stated:

> In circumstances not involving a reduction in force, a plaintiff may make a prima facie case of age discrimination by establishing (1) that he is within the protected age group; (2) that he met applicable job qualifications; (3) that he was discharged; and (4) that, after his discharge, the position remained open and the employer sought applicants with similar qualifications to fill the position. *See, e.g., Holley*, 771 F.2d at 1165. In the context of a reduction in force, however, the fourth requirement creates difficulties. The plaintiff's position does not remain open; rather it is eliminated or combined with another position. *Id.* Accordingly, in *Holley*, we held that to establish a prima facie case in a reduction-of-force situation, the plaintiff must meet the first three requirements and "'must come forward with additional . . . evidence that age was a factor in his termination.'" *Id.* at 1166 (quoting *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087, 1091 (6th Cir. 1984)).

26 F.3d at 823. As *Bashara* demonstrates, we have limited this "additional showing" that age was a factor in the plaintiff's

---

*(Footnote 2 continued)*

(employer violates ADEA even if younger employee receiving favorable treatment is in protected class), *cert. denied*, 498 U.S. 878 (1990), and the Eleventh Circuit has specifically qualified this issue, *see Carter v. City of Miami*, 870 F.2d 578, 582 n.11, 583 (11th Cir. 1989) (noting that the third prong of prima facie case is flexible and inability to show replacement was outside the protected class not absolute bar to establishing prima facie case).

termination to cases involving a reduction in force. Because there is agreement that this is not a reduction-in-force case, we conclude that the district court erred by requiring Rinehart to make an additional showing that age was a factor in his termination as part of his prima facie case.

The defendants argue that the district court simply relied on *Kehoe* in stating the fourth element of the prima facie case and should be affirmed. In *Kehoe*, we stated the fourth element of the prima facie case as follows: "plaintiff must also either show that the employer assigned a non-member of the protected class to do the same work (a fact necessarily absent from this reduction-in-force case) *or* make 'some additional showing' that age played a role in the discharge." 995 F.2d at 119 (quoting *Holley*, 771 F.2d at 1165-66). The defendants acknowledge that *Kehoe* was a reduction-in-force case and that we stated the test in that context. They argue nonetheless that the statement of the test in *Kehoe* applies with full force in this non-reduction-in-force case. In particular, they argue that *Kehoe* establishes that the fourth element of the prima facie case includes a requirement that a non-member of the protected class replaced the fired worker from a protected class. The defendants rely on parenthetical language in *Kehoe*, where we stated that the replacement must come from outside the protected class and then parenthetically noted, "a fact necessarily absent from this reduction-in-force case." 995 F.2d at 119. The defendants assert that if replacement from outside the class is a requirement necessarily absent in a reduction-in-force case, then it must be meant to apply to non-reduction-in-force cases.

To the extent *Kehoe*, a reduction-in-force case, stated the test for non-reduction-in-force cases, we conclude that the statement is dicta which does not control in this case. Moreover, we do not believe the panel in *Kehoe* intended (without citation or discussion) to create a standard that is contrary to our observations in *Hillebrand*, 827 F.2d at 366 n.6. ("plaintiff need not be replaced

by a person outside the protected age group to make out a prima facie case under the ADEA"), and to our Title VII case law, *see Williams,* 14 F.3d at 1308, we well as to the position of the majority of the other circuits. Accordingly, we will not interpret *Kehoe* to create such a standard.

The defendants argue that even if *Kehoe* does not control, we still should affirm the district court's articulation of the fourth element of a prima facie case given the particular facts in this case. The defendants point out that the elements of a prima facie case are flexible and vary depending on the factual situation giving rise to the dispute. *See, e.g., Johnson v. Minnesota Historical Soc.,* 931 F.2d 1239, 1242 (8th Cir. 1991) (citing *Halsell v. Kimberly-Clark Corp.,* 683 F.2d 285, 289 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205 (1983)), and that the prima facie case should require plaintiffs to demonstrate that the adverse employment action occurred "'under circumstances which gave rise to an inference of unlawful discrimination.'" *Halsell,* 683 F.2d at 289 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 n.6 (1981)); *Johnson,* 931 F.2d at 1242 (quoting *Halsell*). The defendants argue that if we reverse the district court and accept Rinehart's argument that the fourth element requires him to show only that a younger worker replaced him, Rinehart will be allowed to establish a prima facie case of age discrimination even though the fact that he was replaced by someone younger should not give rise to an "inference of unlawful discrimination" on the facts of this case. According to the defendants, those relevant facts requiring a greater showing include the fact that Rinehart was the oldest employee of the department, that all three of his logical replacements were younger, and that he was replaced by one of those younger people, Shannon Craven, whom Rinehart admits he would have chosen as his successor.

We are not persuaded that these facts require Rinehart to make a showing beyond our normal prima facie case requirements.

The normal statement of the prima facie case is generally sufficient to raise:

> an inference of discrimination only because we presume [the employers' decisions], *if otherwise unexplained,* are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for [the discharge] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration. . . .

*Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978) (emphasis added) (citation omitted). The only identifiable set of cases where we specifically have required a showing by plaintiff beyond the normal prima facie case are reduction-in-force cases. In those cases, we require plaintiffs to make a showing in addition to the normal prima facie case because the employer's reason for discharging the plaintiff is not "otherwise unexplained." The reduction-in-force is an objective, legitimate explanation of the employer's action which the plaintiff does not call into question by establishing a prima facie case under the regular standards. *See Leichihman v. Pickwick Int'l,* 814 F.2d 1263, 1270 (8th Cir.) (no adverse inference can be drawn in reduction-in-force case if we apply normal prima facie standards because the employer's action is readily explained by employer's economic hardship or downturn in business), *cert. denied,* 484 U.S. 855 (1987); *see also Barnes,* 896 F.2d at 1465 (in reduction-in-force case proving the normal elements of the prima facie case is not enough because no evidence presented under such test that the workforce reductions were not the reason for the adverse employment actions). Accordingly, we require an additional

showing only where the objective factual record already contains a legitimate explanation for the employer's actions that is not accounted for when the plaintiff establishes a prima facie case under normal standards.

Here, we will not require Rinehart to make the additional showing the district court applied in this case, or any other additional showing, because the facts the defendants contend give rise to an additional showing do not provide any objective explanation for the employer's decision to discharge Rinehart. The facts on which the defendants rely do not even address the question of why the City decided to discharge him. Instead, those facts deal only with why the replacement was a logical choice to succeed plaintiff. Hence, the objective factual record does not provide an additional objective explanation for Rinehart's discharge that is not accounted for in the normal prima facie test.

The defendants also argue that policy considerations warrant affirming the district court's statement of the fourth element of the prima facie case. The defendants argue, for example, that requiring only that the replacement be younger would allow a 68-year-old plaintiff to establish a prima facie case of age discrimination even if that plaintiff was replaced by a 67-year-old worker, although no inference of age-based discrimination would be warranted. The defendants contend that the district court's articulation of the fourth element of the prima facie case is more appropriate because it would require a showing which, if satisfied, would raise an inference of age-based discrimination in all such cases.

We need not address the defendants' illustration because those facts are not before us. Rinehart was replaced by someone 19 years younger than he was, not someone a year younger. However, we believe that district courts faced with facts similar to those outlined in the defendants' hypothetical nonetheless would not need to require plaintiff to show that he or she was replaced by someone outside the protected class or to show that

age was taken into consideration in the employment decision. Instead, district courts simply could require the plaintiff to show as the fourth element of a prima facie case that he or she "was replaced by a person *sufficiently younger* to permit an inference of age discrimination." *Armbruster v. Unisys Corp.*, 1994 U.S. App. Lexis 19883 at *24-*25 (3d Cir. 1994) (citing *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992)); *see also Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 (5th Cir. 1988) (plaintiff must show "he was replaced by a worker sufficiently younger in the context of his employment"). Requiring a showing that the replacement is "sufficiently younger" would require the plaintiff to raise an inference of discrimination and would be consistent with our previously stated requirement of the fourth element of the prima facie test.

We conclude that the district court erred in requiring Rinehart to demonstrate that he was replaced by someone outside the protected class or that age was a factor in the termination decision in order to make out a prima facie case of age discrimination. Because we reach that conclusion, we need not address his argument that he sufficiently demonstrated that age was a factor in the termination decision. Accordingly, we reverse the district court's order granting summary judgment on Rinehart's age discrimination claims and remand them to the district court for further proceedings.

**B.**

Rinehart also argues that the district court erred in granting summary judgment on his claim in count IV for reimbursement of LAGERS payments he would have received had the City not terminated his employment. Rinehart has cited no authority to support his LAGERS claim in either this court or the district court. We have found no authority to support the claim. Accordingly, we conclude that the district court committed no error in dismissing this claim without prejudice to its use as an element of damages if liability is established on counts I or III.

## III.

We reverse the district court's grant of summary judgment on Rinehart's age discrimination claims and remand for proceedings consistent with this opinion. We affirm the district court's grant of summary judgment on Rinehart's claim for reimbursement of retirement benefits.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

## APPENDIX B

UNITED STATES COURT OF APPEALS,
FOR THE EIGHTH CIRCUIT

No. 93-3560WMKC

Robert E. Rinehart,
Appellant,

vs.

City of Independence, Missouri, et al.,
Appellees.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Loken would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

December 12, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0728-CV-W-8

ROBERT RINEHART,
Plaintiff,

v.

CITY OF INDEPENDENCE, MISSOURI, et al.,
Defendants.

## ORDER

[Filed: Sept. 28, 1993]

This matter is before the Court on defendants' motion for summary judgment.

Plaintiff was the police chief of Independence, Missouri from October 24, 1980, until he was terminated on April 7, 1992. When he was fired, plaintiff was 67 years old. Plaintiff has brought this suit against the City of Independence, Larry Kaufman, the Acting City Manager who fired him, and Independence Mayor William Carpenter, alleging that a motivating factor behind his termination was his age. His lawsuit contains four counts. Count one alleges age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*. Count II alleges violations of plaintiff's due process and first amendment rights in that he was not given reasons for his discharge or an opportunity to contest the discharge and that he was fired for political reasons. Count III alleges age discrimination in violation of the Missouri Human Rights Act, § 213.110 *et seq.* Finally, count four alleges a claim for state retirement benefits.

This Court recently dismissed plaintiff's claims for punitive damages under Counts II and III. *See* Order of August 31, 1993.

Defendants now move for summary judgment on all counts.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts must be viewed in the light most favorable to the nonmoving party, who must be given the benefit of all reasonable inferences which may be made from the facts disclosed in the record. *Adickes v. S.H. Kress & Co.*, 398 U.S 144 (1970); *Raschick v. Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

If a party is unable to make a sufficient showing as to some essential element of its case upon which it will bear the ultimate burden of proof at trial, all other facts are necessarily immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A party seeking summary judgment bears the initial burden of demonstrating to the court that an essential element of the nonmoving party's case is lacking, *Id.* The burden then shifts to the nonmoving party to come forward with sufficient evidence to demonstrate that there is a factual controversy as to that element, or to explain why such evidence is not currently available. *Id.*; Fed. R. Civ. P. 56(e). If the nonmoving party fails to so respond, summary judgment, if appropriate, shall be entered against such party. Fed. R. Civ. P. 56(e). The standard for determining whether a factual dispute is genuine is the same as the standard applied to motions for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The nonmoving party must come forward with sufficient evidence to allow a reasonable jury to find in its favor. *Id.* at 251.

Defendant argues that summary judgment is appropriate on the age discrimination claims because plaintiff cannot make a prima facie case of discrimination. To establish a prima facie case of age discrimination based on pretext, the plaintiff must show: "(1) he was within the protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was discharged; and (4) his employer attempted to replace him." *Radabaugh v. Zip Feed Mills. Inc.*, 997 F.2d 444, 448 (8th Cir. 1993), *citing Raschick v. Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1111 (1988). The Eighth Circuit has also stated that the fourth element of a prima facie case must include a showing that the plaintiff was replaced by someone outside of the protected class, or some other showing that age played a factor in the discharge. *Kehoe v. Anheuser-Busch. Inc.*, 995 F.2d 117, 119 (8th Cir. 1993).

After the plaintiff has established a prima facie case, the defendant must articulate a legitimate reason for the action, "which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 1824 (1973). The burden is then on plaintiff to persuade the jury that defendant's reason for the termination is merely pretextual and that the real reason for the termination was age discrimination. *Id.*[1]

Defendants admit, for the purposes of this motion, that plaintiff can show the first three elements of the prima facie case.

---

[1] Under the law announced in *Hicks*, once the defendant has provided a legitimate, non-discriminatory reason, the presumption created by the prima facie case is dissolved, and the plaintiff bears the burden of persuading the trier of fact that defendant's proffered reasons are false and that discrimination was the real reason for the termination.

However, they argue that plaintiff cannot satisfy the fourth element, as it is interpreted by the Eighth Circuit.

Contrary to the convoluted and irrelevant posturing in plaintiff's brief, the only issue on this summary judgment motion as to Counts I and III is whether there is a genuine issue of material fact regarding the fourth element of the prima facie case.

Defendants contend that Larry Kaufman alone terminated plaintiff and that he made the decision for reasons other than plaintiff's age. The City Manager position in Independence gives complete authority for hiring and firing to the city manager. Such actions need no input or authority from the Mayor or the City Council. Defendants claim that plaintiff was never told that he was terminated because of his age and that plaintiff knows of no statements by Kaufman about the age of plaintiff or any city employees in general. Defendants claim that no members of the City Council, including Mayor Carpenter, ever discussed plaintiff's termination with Kaufman before April 7, 1992 or otherwise played a role in his termination.

In addition, defendants state that plaintiff's replacement, Major Shannon D. Craven, was 48 years old when he was made acting Chief of Police, and, therefore, was within the protected age group of [sic] under the ADEA.

All of defendants' assertions are backed up with citation of deposition testimony, affidavits, or other documentary evidence. Through these assertions, defendants have demonstrated that an essential element of plaintiff's prima facie case is missing. As discussed above, in order to establish the fourth element of the prima facie case, plaintiff must show either (1) plaintiff was replaced by a person outside of the protected class; or (2) some evidence by which a factfinder could find that the termination was age-related.

Defendant has shown that plaintiff was replaced by 48-year-old. The protected class consists of workers aged forty and older. 29 U.S.C. §§ 621-634. Therefore, plaintiff cannot satisfy the fourth element by this type of showing. Instead, plaintiff must make a prima facie case by coming forward with some other evidence of [sic] that age was a factor.

In his complaint, plaintiff presents four reasons why he suspects that his firing was based on his age: (1) various retirement inquiries by city officials; (2) a comment by the mayor to plaintiff that "If I were you I would leave with some dignity"; (3) a comment about plaintiff's age by the mayor the day before he was fired; and (4) an alleged "hit list" of certain city employees, many of whom are over the age of forty.

Defendant dismisses all comments made by persons other than Kaufman on the grounds that Kaufman alone made the decision to terminate plaintiff. Defendant argues that any inquiry by Kaufman as to when plaintiff was going to retire was unrelated to plaintiff's termination and was based on a previous promise by plaintiff to retire at age 65. These assertions are also supported by deposition testimony, affidavits, or other documentary evidence.

The crucial issue, then, becomes whether plaintiff can show that Kaufman acted with others in deciding to fire plaintiff, and if not, whether there is some evidence that *Kaufman* used age as a reason to fire plaintiff.

Plaintiff disputes defendants' assertion that Kaufman acted alone in terminating him. Under *Celotex*, plaintiff must come forward with sufficient evidence to show that there is a factual dispute as to a material issue. In viewing plaintiff's evidence, the Court must view plaintiff's evidence in the light most favorable to him and grant plaintiff the benefit of all reasonable inferences that can be drawn from the evidence.

First plaintiff asserts that he is not bound by the "self-serving" statements of Kaufman about his acts. Plaintiff is only bound by Kaufman's "self-serving" assertions to the extent that plaintiff is unable to show that there is a genuine issue of material fact as to what Kaufman has claimed. Next, plaintiff sets forth 23 paragraphs of "facts" that put into dispute defendants' claims that Kaufman acted alone or that Kaufman did not discriminate.

Plaintiff's paragraphs a, c, d, e, f, h, i, j, k, and o deal with the desires of Cary George to be assistant chief or later, chief of police. In paragraphs a, e and f, plaintiff asserts that city councilman Ruhlman wanted his friend George to replace Rinehart as chief and asked Rinehart when he would retire. Plaintiff alleges that differing recollections of these events by the parties create a genuine issue of material fact. While the differences may create an issue of fact, the Court cannot see how these posturings by an aspiring officer raise an inference of age discrimination, especially when that aspirant was also within the protected class. Therefore, these facts are not material.

Plaintiff also alleges that the fact that Major Craven, Rinehart's eventual successor, was 48 years old shows an inference of discrimination or shows that Kaufman was not acting alone. This fact does not demonstrate that Kaufman had help in the decision, and as discussed above, Craven's status within the protected class does nothing to make an additional showing of discrimination.

Paragraph m recounts that councilman Callahan told Rinehart after the firing that he did not think Kaufman had the authority to fire plaintiff and expressed a hope that age was not a factor. Callahan's unsupported, hindsighted opinions are not evidence of anything. Plaintiff cannot show that Callahan knew of the true reasons for plaintiff's termination nor that Callahan had any input into the decision. Similarly, paragraph n states that the current City Council is uneasy about the acting city manager

appointing a new police chief. While this may express the council's opinion about Kaufman's powers, it decides nothing about his legal authority or motives for terminating plaintiff.

Paragraph p speaks of Rinehart's health and qualifications, which relates to the second element of the prima facie case, but does not apply to the fourth element.

Paragraphs q and r allege that plaintiff was not told nor did he know of any reason he should have been fired. These may go to the issue of pretext, but do not add to the inquiry on element four.

Paragraphs s, u, v, and w involve comments by persons other than Kaufman, and, therefore, did not relate to Kaufman's decision to terminate Rinehart.

None of the facts recited by plaintiff in any way controvert Kaufman's statement that he acted alone. Therefore, plaintiff is left to only show that Kaufman himself had discriminatory intent.

The only allegations plaintiff is able to put forward that would raise an inference that Kaufman's employment decision was based on age are in paragraphs g and t.

Paragraph g alleges that plaintiff stated in his deposition at page 35 that Kaufman indicated that he wanted to replace plaintiff with a younger person. Plaintiff attached various pages of his deposition testimony in support of his response to the motion for summary judgment. The pages range from 57 to 254, but do not include page 35, where Rinehart makes the allegation. The Court has read the deposition testimony supplied and nothing Rinehart said in those portions makes reference to or supports any allegation that Kaufman told plaintiff he was going to replace him with someone younger. Of particular relevance is the following exchange:

Q. Have you ever heard Mr. Kaufman make any remarks or statements relating to your age?

A. I don't recall.

Q. You don't recall any statements as we are sitting here today that Mr. Kaufman has made?

A. I can't testify to any today because I don't recall.

Q. Have you ever heard Mr. Kaufman make any statements that you recall relating to older people in general?

A. I don't recall.

Q. Have you heard him make any statements relating to older city employees?

[Objection by plaintiff's counsel on the basis of vagueness]

Q. I'm just talking about any comment you recall of any nature in which Mr. Kaufman was discussing the subject of older employees?

A. I can't recall at this time.

Q. Do you recall Mr. Kaufman at any point discussing the age of city employees in general?

A. I don't remember at this time.

Q. Have you ever hear [sic] Mr. Kaufman make any statements or remarks that you think is indicative of a discriminatory attitude on his part toward older individuals?

A. Only when he asked me when I was going to retire, or how much longer I was going to work, or both.

Q. Mr. Kaufman never explained to you why he was asking that?

A. I don't recall asking, and I don't recall whether he explained or not.

Rinehart deposition, at 68-70, attached to plaintiff's response to summary judgment motion as Exhibit A.

This exchange makes clear that Rinehart does not recall any statement by Kaufman that would indicate that he intended to replace him with a younger person. In truth, plaintiff was actually replaced by a younger person. However, as discussed above, the replacement of plaintiff with a younger person does not establish a prima facie case of discrimination where the replacement is younger, but is still within the protected age group. Any statement by Kaufman that he intended to replace plaintiff with Maj. Shannon or Maj. Cary does not raise an inference of discrimination simply because those officers are younger.

The deposition exchange highlights the failure of plaintiff to make any other showing of discriminatory intent by Kaufman. Inquiries about when a person nearing or past retirement age might take retirement are, standing alone, proof of nothing. Besides this comment, plaintiff's case rests entirely on alleged statements of persons extraneous to the decision-making process on his termination.

Paragraph t states that Parley Banks, another Independence employee who was terminated and sued the city for age discrimination, filed an affidavit alleging that Kaufman admitted that he participated in Council discussions about terminating retirement-age employees based on their age. The affidavit claims that Kaufman's admission came in documents filed in Banks' case, which has been dismissed on summary judgment. Plaintiff has not supplied the alleged admissions or anything more solid than Banks' characterizations of them.

While the Court can give no weight to Banks' unsupported allegations, the Court does give considerable weight to the decision of another division of this Court in dismissing his case. *Banks v. City of Independence*, No. 92-0314-CV-W-3 (Hunter, S.J.) On summary judgment in that case, defendants contended that Kaufman made the decision to fire Banks alone. Plaintiff Banks alleged many of the same statements and types of actions as Rinehart alleges in this motion. The *Banks* Court addressed whether plaintiff's barrage of extraneous facts did anything to help plaintiff's effort to establish the fourth element of the prima facie case and found that the facts were irrelevant to the prima facie case of discrimination.

The same issue and nearly the same facts are before this Court, and this Court agrees that plaintiff's large quantity of "facts" do not reveal a genuine issue of material fact. While plaintiff's "facts" may be interesting to a lay reader, they fail to controvert defendant's contention that Kaufman acted alone, and that he acted without using age as a determinative factor. If plaintiff cannot make this showing, he cannot make any causal link between comments that may have been made by others and his termination. Without such a showing, plaintiff fails to state a prima facie case of age discrimination, and defendants must prevail on summary judgment.

Defendants also move for summary judgment as to Count II, which alleges due process, first amendment and Count IV which alleges pension funds claims.

Defendants, in their motion, demonstrated that any failure of plaintiff to receive a post-termination hearing was his own doing, and that there are no grounds for a first amendment claim. Plaintiff has made no effort to controvert the factual allegations of defendants or to argue against defendants' citations of law. The Court finds no basis to support Count II and it shall be dismissed.

As to Count IV, plaintiff alleges that the city failed to return his contributions to the LAGERS retirement fund. In April 1988, the City Council voted to stop requiring city workers to contribute to the LAGERS Retirement System. In September 1992, the City Council acknowledged receipt of a statement of costs to reimburse city employees for contributions they made to the system. In December 1992, the City Council resolved to return contributions at a later date. Finally, in February 1993, the City Council voted to reimburse *current* city employees for contributions made to the fund. Independence City Ordinance No. 12321.

Since plaintiff was not employed by the City in February 1993, he was not eligible to be reimbursed for his contributions to the fund.[2] There is no legal basis upon which plaintiff can support a claim for LAGERS contributions. The Court does understand that plaintiff is receiving his monthly retirement benefits from the LAGERS system.

Plaintiff has advanced no legal argument or factual issue that would preclude summary judgment on this ground.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is GRANTED.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Dated: Sept. 29, 1993

---

[2] An employee may request return of contribution if he or she leaves LAGERS-covered employment before becoming eligible for retirement. Mo. Rev. Stat. § 70.690(1).

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0728-CV-W-8

ROBERT RINEHART,
Plaintiff,

v.

CITY OF INDEPENDENCE, MISSOURI, et al.,
Defendants.

## SUPPLEMENTAL ORDER

[Filed: Sept. 29, 1993]

In the September 28, 1993 Order granting summary judgment to defendants, the Court indicated that plaintiff failed to enclose a portion of deposition testimony upon which he relied to establish a genuine issue of material fact. Upon review of the file, the Court discovered the deposition page was submitted separately as part of a corrected appendix to the suggestions in opposition.[1] As is evident from the Court's order, the assumption that page 35 of the deposition testimony was not supplied is not central to the Court's decision on the relevancy of the allegation made by Rinehart. Rather, the content and context of the statement did not make the necessary showing of intent to discriminate by Kaufman, especially when viewed in conjunction with

---

[1] The Court also notes that page 35 of Rinehart's deposition was submitted as part of defendant's exhibit. While the Court reviewed all exhibits carefully and fully, including all proffered deposition testimony, the Court did not realize that plaintiff's "missing" page had been reviewed as part of defendant's submission. Perhaps this is indicative of the non-relevatory nature of Rinehart's statement.

Rinehart's admission elsewhere in the deposition that Kaufman had never evidenced an intent to discriminate other than by asking when Rinehart would retire. Based on the failure of plaintiff to present any evidence of discrimination, the Court entered summary judgment. The one page of deposition testimony does nothing to change the Court's mind that this case is ripe for summary judgment.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT